Supreme Court, U.S.
FILED
SEP 23 1997
CLERK

No. 97-145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EMILY DISTAJO, RENATO DISTAJO, CONSTANTINO LAMANDO, MILO LAMANDO, JOSE ALBERTO BRENES, ALVARO GUERRERO, MARIA GUERRERO, WESAM YOUMARAN, LINDA YOUMARAN, LOUIS LOENNECKE, MARY ANN BOOKOUT, MICHAEL JOHNSON, GREGORY KANE, DEBORAH KANE, BRUNO GIANNINI, RONALD ROTHMUND, PATRICIA ROTHMUND, JOHN PAPALEO, J.S.P., INC., RAYMOND BICKEL and SANDRA BICKEL,

Petitioners,

vs.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit correctly conclude that petitioners' appeal of a preliminary injunction was moot when the sole ground for appeal asserted by petitioners was that the District Court lacked authority to issue the injunction before entry of a judgment compelling arbitration, and, before the Court of Appeals could consider the appeal, the District Court had issued a judgment compelling arbitration?

2. If the issue is not moot, did the District Court abuse its discretion when it concluded under the unique facts of this case that a brief preliminary injunction preventing further litigation of the petitioners' state court actions was necessary in aid of its jurisdiction over respondent's petitions to compel arbitration under the Federal Arbitration Act, when the court had been exercising jurisdiction over the petitions for over a year and a half and issued the injunction to permit it to consider, on remand from the Second Circuit, the merits of petitioners' defenses to arbitration?

STATEMENT PURSUANT TO RULE 29.6

Doctor's Associates, Inc. has no parent company and no subsidiaries (other than wholly-owned subsidiaries).

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STATEMENT OF THE CASE

This is one in a series of appeals to the United States Court of Appeals for the Second Circuit and this Court by certain Subway sandwich shop franchisees seeking to avoid their contractual obligation to arbitrate their claims against Doctor's Associates, Inc. ("DAI"), the Subway franchisor. *See, e.g., Doctor's Associates, Inc. v. Riggs*, No. 96-9141 (2d Cir.

June 10, 1997), *cert. pending*, No. 97-141; *Doctor's Associates, Inc. v. Distajo, et al.*, 107 F.3d 126 (2d Cir. 1997), *cert. pending*, No. 97-146 ("*Distajo II*"); *Doctor's Associates, Inc. v. Jabush, et al.*, 89 F.3d 109 (2d Cir. 1996); *Doctor's Associates, Inc. v. Stuart, et al.*, 85 F.3d 975 (2d Cir. 1996); *Doctor's Associates, Inc. v. Distajo, et al.*, 66 F.3d 438 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1352 (1996) ("*Distajo I*"). *See also Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996).

DAI is the national franchisor of Subway sandwich shops. The petitioners are present or former Subway franchisees who sued DAI in state court and then refused to arbitrate their claims when DAI demanded arbitration in accordance with the standard arbitration clause in the franchise agreement.[1] In response to each lawsuit and refusal to arbitrate, DAI filed in the United States District Court for the District of Connecticut a separate action to compel arbitration under section 4 of the Federal Arbitration Act, 9 U.S.C. § 4 (the "FAA").[2] In 1994,

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[1] The arbitration clause substantially provides as follows:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. Each party will be responsible for their own costs in conjunction with the arbitration proceeding. If Franchisee commences action in any court prior to an arbitrator's final decision on the controversy or claim, then the Franchisee will be responsible for all expenses incurred by the Company and Franchisee in the arbitration and the court proceedings.

[2] Because a petition to compel under section 4 may be brought only in the federal district with jurisdiction over the contractually designated site of arbitration and because petitioners' franchise agreement with DAI calls for arbitration in Bridgeport (*see* note 1, *supra*), the District of Connecticut

(Footnote continued)

the court granted DAI's petitions to compel arbitration and entered an injunction restraining petitioners from prosecuting their state court actions pending completion of the arbitrations. *See Doctor's Associates, Inc. v. Emily Distajo, et al.*, 870 F. Supp. 34 (D.Conn. 1994).[3]

The franchisees appealed the District Court's decision, and in September, 1995, the Second Circuit issued its opinion in *Distajo I*, affirming the District Court on the majority of its rulings, but vacating the injunction and remanding for further consideration of two of petitioners' remaining defenses to arbitration: whether DAI had fraudulently induced the franchisees' agreements to arbitrate and whether DAI had waived its right to compel arbitration. *See Distajo*, 66 F.3d at 457. The franchisees filed a petition for rehearing and/or rehearing *en banc*, which the Second Circuit denied, and a petition for certiorari that this Court denied on April 1, 1996. *Distajo*, 116 S. Ct. 1352 (1996).

In a transparent effort to prevent the District Court from complying with the Second Circuit's directive to decide on remand their remaining defenses to arbitration, petitioners launched a series of maneuvers to get their state court lawsuits heard before the District Court could make a final ruling on the remanded issues. As the tortured procedural history set forth below shows, petitioners were willing to go to extraordinary lengths -- including violating injunctions -- to prevent the District Court from finally resolving DAI's petitions to compel.

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was the only forum where DAI could properly file its petitions. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995); *Snyder v. Smith*, 736 F.2d 409, 420 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Maria Victoria Naviera, S.A. v. Cementos Del Valle, S.A.*, 759 F.3d 1027, 1031 (2d Cir. 1985); *Lawn v. Franklin*, 328 F. Supp. 791, 793 (S.D.N.Y. 1971).

[3] Petitioners did not request that DAI post a bond when the District Court issued the injunction and did not raise the absence of a bond as an issue in their appeal of that ruling. *See Distajo I, supra.*

Thus, on September 26, 1995, before the Second Circuit's mandate had issued and while petitioners were still enjoined from prosecuting their state court actions,[4] petitioners' counsel asked the Madison County, Illinois Circuit Court to set the case involving petitioners Alvaro and Maria Guerrero for trial in early December, 1995. Counsel made this request even though DAI and its co-defendants had not filed an answer in that proceeding; no discovery had taken place; the Illinois courts had not yet reached a final decision on the arbitrability of the dispute; and DAI's petition for permission to appeal the Madison County court's order denying transfer on *forum non conveniens* grounds was still pending. Nevertheless, one day after petitioners' request and while the original District Court injunction was still in place, the Madison County court granted the Guerreros' request for a December 11, 1995 trial date and refused to hear DAI's motion to take the case off the trial docket. R. App. A-1.[5] At about the same time and once again in violation of the District Court's original injunction, petitioners' counsel also moved the Illinois court for a default judgment in the lawsuit involving petitioners Sandra and Raymond Bickel. Petitioners' Appendix ("Pet. App.") 54a.

While they were seeking a quick trial in Madison County, petitioners tried to delay for as long as possible further action by the District Court on DAI's petitions to compel arbitration. For example, counsel claimed for the first time on remand (over 18 months after DAI filed its first action to compel arbitration) that his clients needed discovery before the District Court could decide the petitions. Yet counsel did not even begin discovery, let alone complete it, before the Second Circuit's mandate issued, and petitioners never introduced any evidence supposedly gleaned from this discovery in their submissions opposing DAI's petitions to compel arbitration.

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[4] The Second Circuit's mandate vacating the first injunction did not issue until November 22, 1995.

[5] "R. App." refers to Respondent's Appendix.

Counsel frankly admitted to the Madison County court what this procedural jockeying was designed to accomplish:

> There is no question here that my clients prefer to have their rights as Illinois franchisees, which include claims under the Illinois Franchise Disclosure Act, that they prefer to have those rights decided by the courts in Illinois . . . **It is, in fact, a race to the courthouse** . . . we are in that area of the law where which court rules first has great significance of what the final outcome of this case will be.

R. App. A-3 (emphasis added).

Because it was clear that petitioners' counsel intended to press for a state court judgment before the District Court could decide the issues that the Second Circuit had directed the court to decide, DAI moved in the Connecticut District Court for a temporary restraining order ("TRO") and for an order to show cause why a preliminary injunction should not issue preventing petitioners from prosecuting their state court lawsuits pending the District Court's deliberations on remand. The District Court granted the TRO on December 5, 1995, enjoining petitioners from prosecuting or in any way advancing their state court lawsuits until further order of the District Court. Pet. App. 61a.[6]

Petitioners immediately filed an Emergency Petition for Writ of Mandamus and/or Prohibition in the Second Circuit seeking an order compelling the District Court to vacate the TRO. *See In re Emily Distajo, et al.*, No. 95-3097 (2d Cir. filed December 7, 1995). In their papers challenging the TRO, petitioners made the same argument they make here -- that under the Anti-Injunction Act, 28 U.S.C. § 2283 ("AIA"), the District Court lacked authority to enjoin state court actions before it had ruled on DAI's petitions to compel arbitration.

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[6] Despite the issuance of the TRO, the Madison County court granted the Bickels' motion for default one day later, on December 6, 1996. Pet. App. 54a.

The Second Circuit denied petitioners' request for emergency relief and also denied their Petition for Writ of Mandamus "without prejudice to reconsideration if [the District Court] does not issue a decision within 30 days after trial." *See* December 7, 1995 and March 12, 1996 rulings in *In Re Emily Distajo, et al.*, R. App. A-5–A-7.

On January 3, 1996, the District Court issued a preliminary injunction barring petitioners from prosecuting their state court actions until further order of the court. Pet. App. 70a. In that decision, the District Court carefully considered and rejected petitioners' claim that the injunction violated the AIA, which the court recognized "forbids federal courts from staying state court proceedings, subject to exceptions that are narrow and are not to be enlarged by loose statutory construction" (citations omitted). Pet. App. 64a-65a.[7] The court explained that one of the three exceptions under the AIA allows a federal court to stay state court proceedings when "necessary in aid of its jurisdiction", and that this exception "encompasses 'circumstances . . . where a federal court is on the verge of settling a complex matter, and state court proceedings may undermine its ability to achieve that objective'." (*citing Standard Microsystems Corp. v. Texas Instruments, Inc.*, 916 F.2d 58 (2d Cir. 1990); *In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985)). Pet. App. 65a.

Based on the unique procedural posture of the case, the court concluded that the "in aid of jurisdiction" exception to the AIA permitted an injunction. As the court explained:

> Although this court is not on the verge of approving a settlement, it is on the verge of resolving this

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[7] The AIA, 28 U.S.C. §2283, provides:

> Stay of state court proceedings. A court of the United States may not grant an injunction to stay proceedings in the state court except as expressly authorized by act of Congress, or when necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

> matter. Only two issues remanded by the Court of Appeals remain to be decided . . . Judicial resources could be conserved by avoiding duplicative consideration by numerous judges of the same issues. Judicial economy could also be served because this court has already acquired substantial familiarity with the issues presented, having had jurisdiction over these and related disputes for over eighteen months.
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> * * *
>
> [T]his is an instance where injunctive relief is "necessary to prevent . . . state court[s] from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *citing, Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281 (1970); *In re Corrugated Container Trust Litig.*, 659 F.2d 1332, 1334-35 (5th Cir.1981), *cert. denied sub nom., Three J. Farms Inc. v. Pls.' Steering Comm.*, 456 U.S. 936 (1982).

Pet. App. 65a-68a. The District Court also noted that issuance of an injunction was consistent with the federal policy, reflected in the FAA, "favoring 'rapid and unobstructed enforcement of arbitration agreements.'" (*quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983)). Pet. App. 64a n.2. Finally, the District Court held that DAI was not required to post a bond, relying on its decisions in earlier cases involving DAI and franchisees represented by the same counsel.[8] Pet. App. 70a.

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[8] For example, in a July 27, 1995 decision in *Doctor's Associates, Inc. v. Stuart*, Case No: 395CV01065, the District Court held that DAI was not required to post a bond, "because the obligation to arbitrate will not result in damage or loss to defendants". The District Court's decision was upheld on appeal. *Stuart*, 85 F.3d 975 (2d Cir. 1996). While petitioners in *Distajo* requested a bond, they never explained how they would be

(Footnote continued)

Petitioners appealed the District Court's issuance of the preliminary injunction on January 4, 1996, the day after it had entered. However, the District Court's order accomplished its intended purpose of affording the court a brief period to resolve the issues remanded by the Second Circuit. On February 14, 1996, the District Court issued a decision holding that petitioners' fraudulent inducement defense failed as a matter of law. Pet. App. 71a. On March 14, 1996, after further briefing and submissions from each petitioner, the court issued a comprehensive opinion, which considered and rejected all remaining defenses to arbitration; granted each petition to compel; and separately determined that the January 3, 1996 preliminary injunction should be continued in order to effectuate the court's final judgment compelling arbitration. Pet. App. 76a. Thus, the January 3, 1996 preliminary injunction was expressly continued, and thus superseded, on a new ground -- namely, that an injunction was necessary in order to effectuate the court's judgment compelling arbitration -- rather than on the basis of the "in aid of jurisdiction" exception previously relied upon by the court. Petitioners then took a second appeal to the Second Circuit, which had not yet ruled on petitioner's appeal from the issuance of the January 3, 1996 preliminary injunction. In their second appeal, petitioners did not challenge the District Court's authority to issue an injunction, thereby recognizing that the District Court did have authority under the AIA to enter an injunction effectuating its judgment compelling arbitration.

On February 24, 1997, the Second Circuit granted DAI's motion to dismiss petitioners' first appeal from the District Court's January 3, 1996 preliminary injunction decision. Because the sole ground for challenging the injunction was that it was issued prior to a judgment compelling arbitration and the District Court had since issued a judgment compelling arbitration, the Second Circuit ruled that the appeal was moot. Pet. App. 31a. The Second Circuit's order was unpublished

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damaged by the injunction and offered no evidence to quantify their alleged damage.

and summary. *Id.* This Petition is limited to that summary order.

Also on February 24, 1997, the Second Circuit affirmed the District Court's judgment granting DAI's petitions to compel arbitration and the March 14, 1996 injunction effectuating that judgment. *Distajo II*, *supra*.[9] Petitioners have filed a separate petition for certiorari, docketed as No. 97-146, from the Second Circuit's decision in *Distajo II*. Significantly, the Petition in 97-146 **does not** challenge the District Court's March 14, 1996 injunction.

REASONS FOR DENYING THE PETITION

Petitioners argue that, after exercising jurisdiction over DAI's petitions to compel arbitration under the FAA for over a year and a half, the District Court lacked authority under the AIA to issue a brief preliminary injunction in aid of its jurisdiction to permit the court to consider the merits of the defenses to arbitration that the Second Circuit had remanded. This Court should deny the Petition for several reasons.

First, as the Second Circuit correctly concluded, petitioners' challenge to the District Court's preliminary injunction is now moot. The January 3, 1996 preliminary injunction expired one and one-half years ago when it was superseded by the District Court's March 14, 1996 decision to continue the preliminary injunction on new and entirely separate grounds in order to effectuate its final judgment compelling arbitration. Petitioners have never challenged the District Court's authority under the AIA to issue an injunction in order to effectuate its judgment compelling arbitration. Therefore, any decision by this Court regarding the appropriateness of the original January 3, 1996 preliminary injunction would be

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[9] The Second Circuit also affirmed the District Court's determination that no bond was required for either the January 3, 1996 or March 14, 1996 injunctions. *Distajo*, 107 F.3d at 135-36. Petitioners have not sought review of that decision.

purely advisory and would have no effect on the status of the case or the parties.

Second, there is no conflict with decisions of this Court regarding the AIA that requires review. The Second Circuit never addressed petitioners' AIA arguments because it determined that petitioners' appeal was moot. In any event, the District Court's decision granting the brief preliminary injunction under the unique facts of this case is fully consistent with prior decisions of this Court and the decisions of numerous federal courts, holding that injunctions to enjoin state court proceedings pending arbitration are appropriate.

Third, the District Court's fact-bound determination does not warrant the Court's review. The District Court's exercise of discretion to issue a preliminary injunction was based on the unique facts and procedural history of this case, which had been litigated in the District Court for over a year and a half and which was on remand from the Second Circuit. There are, therefore, no compelling issues of law that require review.

I. The Question Presented By The Petition Is Moot.

Federal courts have "no authority 'to give opinions upon moot questions or abstract propositions, or to declare principals or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (*citing Mills v. Green*, 159 U.S. 651, 653 (1895)). A case is rendered moot if an event occurs making it impossible for the court to grant any effective relief. *Id.* When the issues presented on appeal have become moot, the appeal must be dismissed. *Id.*

In this case, petitioners concede that the District Court had the authority under the AIA to enter the March 14, 1996 injunction in conjunction with its judgment compelling arbitration.[10] Petition ("Pet.") 10. They do not even challenge that

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[10] Thus, petitioners have accepted what is well established in the law. *Network Cinema Corp. v. Glassburn*, 357 F. Supp. 169, 172 (S.D.N.Y. 1973) (federal court may enjoin state court action in order to effectuate its

(Footnote continued)

injunction in their Petition in *Distajo II*. *See* Petition for Certiorari, Docket No. 97-146. Petitioners' only complaint is that the court lacked authority to enter the January 3, 1996 preliminary injunction **before** it had entered its judgment compelling arbitration. However, that issue is now moot (as it was at the time the Second Circuit ruled) because the January 3, 1996 preliminary injunction was superseded by the District Court's March 14, 1996 judgment compelling arbitration and continuing the injunction on new grounds, which judgment the Second Circuit has now affirmed.

It is well settled that an appeal from a preliminary injunction is rendered moot when circumstances change such that the grounds for complaint no longer exist or when the injunction otherwise expires. *Oil Chemical and Atomic Workers International Union v. Missouri*, 361 U.S. 363, 367 (1960) (when injunction expired, appeal rendered moot); *see also Stricklin v. Regents of Univ. of Wisconsin*, 420 F.2d 1257, 1259 (7th Cir. 1970) (school's appeal from order requiring reinstatement of suspended students on basis of school's failure to hold a due process hearing, became moot once hearing held); *Bank of New York Co., Inc. v. Northeast Bancorp, Inc.*, 9 F.3d 1065, 1066-67 (2d Cir. 1993) (appeal from denial of injunction sought to prevent bank merger became moot when merger completed); *Phillips v. Dallas Indep. School Dist.*, 464 F.2d 90, 91 (5th Cir. 1972) (student's appeal from denial of temporary injunction restraining enforcement of school's suspension order rendered moot when school year ended). The Second Circuit's decision that petitioners' appeal was moot was, therefore, supported by the facts and is fully consistent with decisions of this Court and other courts.

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judgment compelling arbitration); *Hatzlachh Supply, Inc. v. Moishe's Electronics, Inc.*, 828 F. Supp. 178, 185 (S.D.N.Y. 1993) (same); *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1052 (D.Colo. 1991) (same); *A.L. Williams & Assoc. v. McMahon*, 697 F. Supp. 488, 495 (N.D.Ga. 1988) (same); *Pervel Indus., Inc. v. T M Wallcovering, Inc.*, 675 F. Supp. 867, 870, (S.D.N.Y. 1987), *aff'd*, 871 F.2d 7 (2nd Cir. 1989) (same); *Blount Brothers Corp. v. M.K. Steel, Inc.*, 524 F. Supp. 1037, 1039 (N.D.Ala. 1981) (same).

Petitioners all but concede that their challenge to the preliminary injunction is moot because of the District Court's issuance of a judgment compelling arbitration, but attempt to create a justiciable issue by threatening to pursue a damage action because the District Court's January 3, 1996 preliminary injunction was "wrongful." Pet. 18. However, an unspecified threat of future legal action does not render an otherwise moot issue justiciable. *Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985) (speculative contingencies do not render an otherwise moot issue worthy of review).

Furthermore, there can be no claim for damages from a "wrongful injunction" unless a bond was set when the injunction was issued. *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770 n.14 (1983) (party injured by erroneous injunction has no claim for damages absent a bond); *Cagen v. Mutual Benefit Life Ins. Co.*, 28 F.3d 654, 656 (7th Cir. 1994) ("[i]n all but exceptional cases the lack of an injunction bond means the unavailability of damages for wrongful injunction"); *Blumenthal v. Merrill Lynch*, 910 F.2d 1049, 1056 (2d Cir. 1990) (plaintiffs entitled to damages for wrongful injunction only up to the amount of the bond); *In Re Ladner*, 799 F.2d 1023, 1025 (5th Cir. 1986) (dismissing wrongful injunction claim where no bond posted); *Buddy Systems, Inc. v. Exer-Genie, Inc.*, 545 F.2d 1164, 1167-68 (9th Cir. 1976), *cert. denied*, 431 U.S. 903 (1977) (recognizing "no bond", "no damages" rule). Here, the District Court did not require a bond, and the Second Circuit affirmed that decision.[11]

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[11] Each of the cases cited by petitioners is distinguishable; certainly none of them holds that the threat of future legal action where no bond was posted is sufficient to avoid the mootness doctrine. Thus, in *Washington Steel Corp. v. TW Corp.*, 603 F.2d 594 (3rd Cir. 1979), because a bond had been issued and damages were available, the appeal was not moot. In both *Hedberg v. State Farm Mut. Auto. Ins. Co.*, 350 F.2d 924 (8th Cir. 1965) and *Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 79 (2d Cir. 1977), the party seeking damages for wrongful injunction had specifically pleaded, in the case before the court, a cause of action for wrongful injunction as well as separate common law and statutory causes

(Footnote continued)

Because any challenge to the preliminary injunction became moot when the District Court issued a judgment compelling arbitration and because the question whether petitioners' appeal was moot is a fact-specific issue that raises no important questions of law, the Court should deny the Petition.

II. The Decision Below Does Not Conflict With Any Decision Of This Court.

Petitioners allege that the District Court's decision granting the January 3, 1996 preliminary injunction conflicts with this Court's decision regarding the AIA in *Vendo v. Lektro-Vend Corp.*, 433 U.S. 523 (1977). As an initial matter, it is important to recognize that the Second Circuit never reached any issues under the AIA because it determined that petitioners' appeal was moot. There is no Court of Appeals decision on the AIA for the Court to review. Therefore, this case is a highly inappropriate vehicle for consideration of the AIA issues raised in the Petition.

In any event, the District Court's decision does not conflict with *Vendo* or any other decision of this Court. *First*, the legal issues raised in *Vendo* are completely distinguishable from those presented by this case. *Vendo* did not involve a petition to compel arbitration under the FAA. The question presented in *Vendo* was whether the Sherman Act provided express authorization for an injunction within the meaning of the AIA. In this case, DAI did not argue and the District Court did not decide that the FAA provided express authorization for an injunction. Rather, the court decided that under the unique facts of this case a brief injunction was permissible under the AIA's "in aid of jurisdiction" exception.

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of action and claims for damages. By contrast, petitioners made no such claim below and have not raised in their Petition any issue other than the appropriateness of the preliminary injunction. Thus, unlike *Hedberg* and *Commerce Tanker*, there is no justiciable issue that remains to be considered by this Court.

Second, *Vendo* is also factually distinguishable. The party seeking an injunction in *Vendo* allowed the state court action to proceed for nine years and never once sought a stay of the proceedings. It was only after nine years of litigation and a $7 million judgment, affirmed by the state Supreme Court that Lektro-Vend sought an injunction. Furthermore, the injunction was designed to prevent enforcement of the state court judgment as opposed to staying a non-final, pending state action.

By contrast, DAI sought to compel arbitration and enjoin the state court lawsuits immediately after the state court actions were filed. When the January 3, 1996 preliminary injunction entered, the federal courts had been actively exercising jurisdiction over DAI's petitions to compel arbitration for more than 18 months. The District Court had already considered and rejected the franchisees' defenses to arbitration. Moreover, the Second Circuit had reviewed the District Court's conclusions and affirmed most of them, remanding the case for further consideration on only two discreet issues necessary for a final ruling. Thus, when the preliminary injunction issued, the federal courts had already invested a great deal of time and resources in reviewing the issues presented by the franchisees. Also, the franchisees had already been under an injunction for more than a year.

Furthermore, the only reason the District Court was required to act was because the petitioners were intent on doing everything they could -- including violating the District Court's original injunction -- to avoid and delay a decision by the District Court on DAI's petitions to compel arbitration, completely contrary both to the federal policy favoring "rapid and unobstructed" enforcement of arbitration agreements, *Moses H. Cone*, 460 U.S. at 22-23, and to the intent of the Second Circuit in remanding the matter to the District Court for disposition of petitioners' remaining claims. If trial had proceeded in state court, the District Court's jurisdiction to grant DAI the relief to which it was entitled under the FAA would have been impaired. Although the "in aid of jurisdiction" exception to the AIA is narrow, as the District Court

explicitly recognized, this Court nonetheless has held that this exception allows relief, where, as here, it is "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970); *see* Pet. App. 68a.

Only "real and embarrassing conflicts" warrant review. *Layne & Bowler Corp. v. Western Well Workers, Inc.*, 261 U.S. 387, 393 (1923). Conflicts that exist only in the minds of the parties are not sufficient to justify certiorari. Since *Vendo* had nothing to do with the right of a party to a valid arbitration agreement to enjoin parallel state court actions and since *Vendo* is so factually distinguishable from this case, there are no conflicts with decisions of this Court that require review.

Petitioners state, without supporting their argument, that the District Court's decision conflicts with a number of other decisions of this Court. However, the only apparent connection between this case and the cases cited is that they all involved an injunction. Beyond this superficial, meaningless similarity, the cases cited are wholly distinguishable and in no way conflict with the decision to grant an injunction in this case. Not one of the cases cited involved a petition to compel arbitration under the FAA; none addressed a party's right to an injunction pending arbitration and none involved a circuit court's direction to a district court to decide issues on remand in a long-pending matter. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988) (injunction in aid of jurisdiction was inappropriate because there was no federal lawsuit pending to protect); *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U.S. 511 (1955) (District Court lacked jurisdiction over entire case and, therefore, did not have jurisdiction to enter injunction); *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) (in labor dispute, District Court did not have authority to overturn a final state court judgment). The District Court's decision does not conflict with the decisions of this Court, and

is also fully consistent with the numerous decisions of federal courts that have enjoined state court proceedings pending arbitration. *See* note 5, *supra*. Petitioners are unable to cite to a single case to the contrary.

III. The District Court's Fact-Bound, Discretionary Determination That A Preliminary Injunction Was Necessary In Aid Of Its Jurisdiction Does Not Warrant Review.

The District Court expressly recognized that the exceptions to the AIA should be narrowly construed and applied the well-established "in aid of jurisdiction" exception to the unique facts of this case. Pet. App. 64a-65a. Thus, there are no compelling legal issues at stake here. Instead, this case only involves the application of these well-established legal principles to the unique facts of this case. The fact-specific decision by the District Court under the unique facts of this case to exercise its discretion to issue a brief injunction to allow it to rule on the matters before it does not warrant review by this Court. *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Court will not review factual findings). *See also Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (Court will not review findings of fact without showing of exceptional error.)

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent
Doctor's Associates, Inc.

Dated: September 23, 1997

APPENDIX

Appendix A

[Filed Oct. 6, 1995]

THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Alvaro Guerrero et al

Plaintiff

vs.

Doctor's Associates, Inc. et al

Defendant

No. 93-L-1295

Div. _____

_____

ORDER

Letter-motion of Defendants, Doctor's Associates, Inc. et al to remove case from trial docket of December 11, 1995 is Heard and Denied.

/s/ David Duree
atty for pltfs
/s/ Glenn E. Davis
Atty for Defendants
621-5070

Date 10-6-94

/s/ A. A. Matoesian
Judge

Appendix B

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

MIKE (MUSHTAQ) KANCHWALA, ANVER KANCHWALA, and AZIM HAMANI,	)	
Plaintiffs,	)	
-vs-	)	
DOCTOR'S ASSOCIATES, INC., FREDERICK A. DELUCA, PETER H. BUCK, JOANN BACHEWICZ and SUBWAY RESTAURANTS, INC.,	)	No. 95-L-1291
Defendants.	)	

REPORT OF PROCEEDINGS

HEARING ON MOTIONS

BEFORE THE HONORABLE A. A. MATOESIAN, CIRCUIT JUDGE PRESIDING

APPEARANCES:

Mr. David M. Duree
Attorney at Law
812 N. Collins, Laclede's Landing
St. Louis, Missouri 63102-2174
Appearing for Plaintiffs

Mr. Theodore J. Williams, Jr.
and
Mr. David G. Loseman
Attorneys at Law
One Metropolitan Square
St. Louis, Missouri 63102
Appearing for Defendants

DATE: October 13, 1995
Dorothy Warren, C.S.R.
Official Court Reporter
C.S.R. =084-001421

going forward with the other case. So when I said before Judge O'Neill in the summer of 1994 that it was a race to the courthouse, what I said was an accurate statement of the law. There is no question here that my clients prefer to have their rights as Illinois franchisees, which include claims under the Illinois Franchise Disclosure Act; that they prefer to have those rights decided by the courts in Illinois. It is beyond question that the franchisor, Doctor's Associates, Inc., prefers to have its rights decided by the federal court in Connecticut and/or arbitrators in Connecticut. There is no dispute about that. It is, in fact, a race to the courthouse. But there's nothing illegal, immoral, or improper about the fact that's what the law is, because we have a dual system of jurisprudence. We have the federal system. We have the state system. And we are in that area of the law where which court rules first has great significance of what the final outcome of the case will be. So I make no apologies for asking this Court to rule on my motions before this Court, before the court in Connecticut can rule on similar motions and simultaneously issue an injunction prohibiting me from going forward with this court.

THE COURT: I understand your position.

MR. WILLIAMS: But the problem is simply this. In the other cases we had a right to argue our forum motion; albeit

Appendix C

[Filed Dec. 7, 1995]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Note:
Affidavit Attached

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

95-3097
Docket Number

IN RE: Emily Distajo, et al.

Petitioners

NOTICE OF MOTION
For Emergency Stay of Preliminary Injunction and TRO's

MOTION BY:
David M. Duree (314) 621-5743
Reinert & Duree, P.C.
812 N. Collins
Laclede's Landing
St. Louis, MO 63102-2174

OPPOSING COUNSEL:
Edward Wood Dunham
WIGGIN & DANA
One Century Tower
New Haven, CT 06508-1832
(203) 498-4400

Has Consent of Opposing Counsel:

A. been sought? No

B. been obtained? No

Has service been effected? Yes

Is oral argument desired? No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))
December 11, 1995

***EMERGENCY MOTIONS*, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL**

Has reqeust for relief been made below? No
See Note 1, page 2.

Would expedited appeal eliminate need for this motion? No

Has argument date of appeal been set:

A. by scheduling order? No

B. by firm date of argument notice? No

C. If Yes, enter date ___

Judge or agency whose order is being appealed:
Honorable Peter C. Dorsey, CT Dist Court

If No, explain why not:
The preliminary Injunction and TRO's are barring a State Court jury trial scheduled to begin on Monday, 12/11/95*

Will the parties agree to maintain the status quo until the motion is heard? No

*and other proceedings in the State courts scheduled later in the same week.

Brief statement of the relief requested: Emergency stay of the preliminary injunction of November 28, 1995 and the TRO's of December 5, 1995 issued by the Respondent, barring prosecution of State court lawsuits, until the Petition for Writs of Mandamus and/or Prohibition is heard.

By:	Appearing for:	Petitioner: Defendant
/s/ David M. Duree	Petitioners, Emily Distajo, et al.	
	December 7, 1995	

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is *denied.*

[Filed Dec. 7, 1995]

/s/ Jon O. Newman
Circuit Judge

Appendix D

[Filed March 12, 1996]

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square in the City of New York, on the 12th day of March one thousand nine hundred and ninety-six.

IN RE:
EMILY DISTAJO; RENATO DISTAJO; CONSTANTINO LAMANDO; MILO LAMANDO; JOSE ALBERTO BRENES; ALVARO GUERRERO; MARIA T. GUERRERO; WESAM S. YOUMARAN; LINDA YOUMARAN; JULIE SHINO; JOHNSON SHINO; ALBERT YONAN; LEYLAH YONAN; LOUIS LEONNEKE; MARY ANN BOOKOUT; MICHAEL JOHNSON; JOHN A MCCRARY; JOHN GILLON; SONYA SMITH; PAUL RIISE; MELISSA RIISE; RHONDA BENTON; GREGORY F. KANE; DEBORAH A. KANE; BRUNO GIANNINI; RONALD ROGHTMUND; PATRICIA ROUGHTMUND; JOHN S. PAPALEAO; J.S.P., INC.; RAYMOND BICKEL; SANDRA BICKEL; MIKE MUSHTAQ KANCHWALA; ANVER KANCHWALA; AZIM HEMANI,

Petitioners.

********** Docket No. 95-3097

DOCTOR'S ASSOCIATES, INC.;

Plaintiff,

-V-

EMILY DISTAJO; RENATO DISTAJO; CONSTANTINO LAMANDO; MILO LAMANDO; JOSE ALBERTO BRENES; ALVARO GUERRERO; MARIA T. GUERRERO; WESAM S. YOUMARAN; LINDA YOUMARAN; JULIE SHINO; JOHNSON SHINO; ALBERT YONAN; LEYLAH YONAN; LOUIS LEONNEKE; MARY ANN BOOKOUT; MICHAEL JOHNSON; JOHN A MCCRARY; JOHN GILLON; SONYA SMITH; PAUL RIISE; MELISSA RIISE; RHONDA BENTON; GREGORY F. KANE; DEBORAH A. KANE; BRUNO GIANNINI; RONALD ROGHTMUND; PATRICIA ROUGHTMUND; JOHN S. PAPALEAO; J.S.P., INC.; RAYMOND BICKEL; SANDRA BICKEL; MIKE MUSHTAQ KANCHWALA; ANVER KANCHWALA; AZIM HEMANI,

Defendants.

ORDER

A Petition for a writ of mandamus having been filed,

Upon consideration thereof,

IT IS HEREBY ORDERED that the petition be and it hereby is DENIED without prejudice to reconsideration if Judge Dorsey does not issue a ruling within 30 days after trial.

FOR THE COURT:
George Lange III, Clerk
/s/George Lange III